

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION, AND MCIMETRO ACCESS TRANSMISSION SERVICES, LLC	DOCKET NO. NIA-99-35
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**ORDER DENYING MOTION FOR REHEARING**

(Issued December 15, 2004)

On August 2, 2004, MCI metro Access Transmission Services, LLC (MCI), filed an application with the Utilities Board (Board) requesting the Board approve an amendment to a negotiated interconnection agreement between MCI and Qwest Corporation, f/k/a U S West Communications, Inc. (Qwest), and a Qwest Platform Plus™ (QPP) Master Services Agreement between the two companies. The amendment filed by MCI was identical to an amendment filed for Board approval on July 27, 2004, by Qwest. Pursuant to 199 IAC 38.7(4)"b," notice of the amendment and Master Services Agreement was published on the Board's Web site, providing for any comments or objections to be filed by September 1, 2004. No objections or comments were filed concerning the amendment and it was approved under the provisions of 199 IAC 38.7(4)"d" on September 6, 2004.

On August 16, 2004, Qwest filed a motion to dismiss the application for approval of the Master Services Agreement, contending that the agreement was not an interconnection agreement subject to Board review. Qwest argued that the

Master Services Agreement does not fall within Section 252 of the Federal Telecommunications Act<sup>1</sup> and is therefore not subject to Board review or approval.

After reviewing filed comments, responses to Qwest's motion to dismiss, and briefs on the legal issues, the Board denied Qwest's motion to dismiss the application for review.<sup>2</sup> The Board stated:

The Board finds that the agreement between Qwest and MCI is subject to the filing requirements of 47 U.S.C. § 252(a)(1). Regardless of Qwest's obligations under the TRO and USTA II, the agreement between Qwest and MCI is a public contract that pertains to the obligations of 47 U.S.C. § 251. The agreement sets forth a description of services and elements to be offered; it contains performance measurements and obligations; and it contains rate structures and elements. Thus, § 252(a)(1) requires the agreement be filed with the Board for review and approval.<sup>3</sup>

On November 18, 2004, Qwest filed its application for rehearing, arguing the Board determined the correct standard for determining whether an agreement between carriers should be filed pursuant to Section 252, but applied the standard incorrectly. Qwest argues that the Board failed to determine that the services involved in the Master Services Agreement are subject to 47 U.S.C. § 251(b) or (c) before applying the standard to determine whether the agreement should be filed pursuant to Section 252.

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<sup>1</sup> 47 U.S.C. § 252.

<sup>2</sup> See, "Order Denying Motion to Dismiss Application for Review of Negotiated Commercial Agreement and Approving Interconnection Agreement," Docket No. NIA 99-35, issued October 29, 2004.

<sup>3</sup> *Id.* at 6-7.

On December 2, 2004, MCI filed an objection to the application for rehearing reiterating its arguments made in previous filings and noting that in every state where Qwest's motion to dismiss has been acted upon, the motion has been denied. Those states include Colorado, Minnesota, New Mexico, Oregon, South Dakota, Washington, and Wyoming.

Whether an agreement must be filed under § 252 depends on whether the agreement is related to any of the obligations an ILEC has under § 251(b) and (c) to make its network available to competitors. The controlling factor is whether the agreement pertains to the obligations contained in § 251(b) or (c). Although Qwest has tried to separate the Master Services Agreement from the amendment to the previously-approved interconnection agreement between the two companies, it is apparent from a review that the two seemingly separate contracts are very much interrelated and each depends upon both agreements being in effect.

The Master Services Agreement provides, at paragraph 23:

In the event the FCC, a state commission or any other governmental authority or agency rejects or modifies any material provision in this Agreement, either Party may immediately upon written notice to the other Party terminate this Agreement and any interconnection agreement amendment executed concurrently with this Agreement.

Paragraph 2.2 of the Batch Hot Cut Amendment provides, in part:

If the QPP MSA is terminated (for reasons other than material breach by MCI) with respect to a particular state, this Amendment, by its own terms and notwithstanding any requirement that subsequent modifications or amendments be in writing signed by both Parties, automatically be terminated in that state, and MCI shall be free thereafter to

pursue any available means to purchase UNE-P or equivalent services from Qwest.

In other words, if a state commission rejects the Master Services Agreement, the Batch Hot Cut Amendment is invalidated as well. Therefore, the amendment and the Master Services Agreement are inexorably intertwined.

In *Sage v. P.U.C. of Texas*, the court considered a similar argument by Southwestern Bell Telephone Company and stated:

If the parties were permitted to file for approval on only those portions of the integrated agreement that they deem relevant to § 251 obligations, the disclosed terms of the filed sub-agreements might fundamentally misrepresent the negotiated understanding of what the parties agreed.<sup>4</sup>

The Court also noted:

Without access to all terms and conditions, the PUC could make no adequate determination of whether the provisions fulfilling § 251 duties are discriminatory or otherwise not in the public interest. For example, while the state terms of publicly filed sub-agreement might make it appear that a CLEC is getting a merely average deal from an ILEC, an undisclosed balloon payment to the CLEC might make the deal substantially superior to the deals made available to other CLECs. Lacking knowledge of the balloon payment, neither the State commission nor the other CLECs would have any hope of taking enforcement action to prevent such discrimination.<sup>5</sup>

The Board finds that because the Master Services Agreement is an integral part of the overall agreement, it was subject to the Board's jurisdiction and review pursuant to 47 U.S.C. 252(e).

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<sup>4</sup> *Sage Telecom, LP v. Public Util. Comm'n of Texas*, Case No. A-04-CA-364-SS, at 11-12 (W.D. Tex. Oct. 7, 2004).

<sup>5</sup> *Id.*

**IT IS THEREFORE ORDERED:**

"Qwest's Application for Rehearing or Order Denying Motion to Dismiss Application for Review of Negotiated Commercial Agreement" filed on November 18, 2004, is denied.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 15<sup>th</sup> day of December, 2004.